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IN THE

Supreme Court of the United States

October Term, 1970
No. 534

UNITED STATES OF AMERICA,

Appellant,

vs.

NORMAN GEORGE REIDEL,

Appellee.

On Appeal From the United States District Court for the Central District of California.

PETITION FOR REHEARING.

Norman George Reidel, appellee, respectfully presents this petition for a rehearing based upon the grounds which follow hereinafter.

1. The majority opinion states that the focus of the language in *Stanley* was on freedom of mind and thought and on the privacy of one's own home. "It does not require that we fashion or recognize a constitutional right in people like Reidel to distribute or sell obscene materials." (Slip Opinion, 5). With all due deference, this Court was not requested by appellee to "fashion" a constitutional right in favor of appellee. Appellee's position is that the Constitution has already provided the right of appellee to distribute or sell explicit sexual materials to adults who wish to re-

ceive them for their private consumption. Further, there is no basis, it is submitted, for the conclusion that recognition of a First Amendment right of an adult to receive explicit sexual materials, and a concomitant right to sell to such an adult, would "effectively scuttle Roth". (Slip Opinion, 5). The District Court, it is submitted, did not ignore Roth nor "the express limitations on the reach of the *Stanley* decision". (Slip Opinion, 4). The District Court followed the dictates of the First Amendment and the interpretative decisions of this Court from *Roth* to *Stanley*.

(a) To reach the result in the case herein, the majority opinion was compelled to excise the principles of the First Amendment from the decision of the Court in *Stanley v. Georgia*, 394 U.S. 557. It appears that the rights of adult citizens to read or observe what they please, their rights to have and view explicit sexual material in private, are not rights guaranteed by the First Amendment but "are independently saved by the Constitution". (Slip Opinion, 5). In short, the majority opinion holds that the "added dimension" referred to in the *Stanley* opinion was the only dimension in the case; that Stanley's right "to receive information and ideas, regardless of their social worth" was founded solely on a constitutional right to be free from "unwanted governmental intrusions into one's privacy". (394 U.S. at 564).

In thus diluting the opinion and judgment in *Stanley*, the majority opinion overlooks two important matters. In the first place, the plain language of the opinion in *Stanley* stresses an adult's right under the free speech and press provisions of the First Amendment to receive explicit sexual materials for his private consumption.

The references to *Martin v. City of Struthers,* 319 U.S. 141 and *Lamont v. Postmaster General,* 381 U.S. 301, make this crystal clear. Since *Stanley* so held, there can be no dispute, and indeed appellant recognized, that integral to the particular constitutional right to receive explicit sexual material is the freedom to distribute the material to the willing adult recipient. This Court has never before held that a First Amendment right of an adult to receive information and ideas may be abridged by prohibiting the distribution of such information and ideas to the willing adult. That liberty of circulation is integral to the exercise of freedoms of speech and press is a constitutional truism.

In the second place, a ruling that it is constitutionally impermissible to apply the federal obscenity statute to the mailing of explicit sexual materials to a willing adult for his private consumption would in no way, it is submitted, "scuttle" *Roth.* Indeed, such a ruling would be consistent with the decisions of this Court which followed and interpreted *Roth.* In *Roth,* this Court affirmed that all ideas having even the slightest redeeming social importance have the full protection of the guarantees of the Constitution. At the same term of court, in *Butler v. Michigan,* 352 U.S. 380 (1957), a statute which prohibited the distribution to the general reading public of allegedly obscene material was unanimously stricken when construed and applied to punish such distribution because the material might fall into the hands of minors. Thus, at the very outset, the Court established the basic proposition that the rights of the general population could not be curtailed in an effort to protect children, or any other limited segment of the population.

In *Smith v. California,* 361 U.S. 147 (1959), this Court acknowledged that the holding in *Roth* did not mean that there could be no constitutional barrier to any form of exercise of the State's power to prevent the distribution of obscene matter. In *Marcus v. Search Warrants of Property,* 367 U.S. 717 (1961), and *Quantity of Copies of Books v. Kansas,* 378 U.S. 205 (1964), this limitation on state power was recognized as essential to protect the right of the public in a free society to unobstructed circulation of constitutionally protected books. In *Jacobellis v. Ohio,* 378 U.S. 184 (1964), this Court reiterated that a total suppression of material dealing with sex could not be justified upon the ground that the dissemination of such material might be deemed harmful to children. The Court called upon state and local authorities to enact laws aimed specifically at preventing distribution of objectionable material to children, rather than totally prohibiting its dissemination. In *Redrup v. New York,* 386 U.S. 767 (1967), the varied civil and criminal judgments against distributors of allegedly obscene materials to willing adults were all reversed. This Court held that where there is no suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, and where the statute does not reflect specific and limited state concern for juveniles, the judgments of conviction and suppression could not stand.

Stanley, therefore, was no more than an inevitable development of the standards which this Court itself had been promulgating since the decision in *Roth. Stanley* in no way denied the power of the State to prohibit the dissemination of explicit sexual materials to

minors or the dissemination of such materials in a manner which obtrusively intruded upon the sensibilities and privacy of the general public. *Roth,* to that extent, remained unimpaired. *Stanley* dealt solely with an adult's freedom of choice; an adult's right to read and view explicit sexual materials for his own intellectual and emotional satisfactions. *Stanley* held that the State could not justify its prosecution of Stanley solely upon the claim that obscenity was not an essential part of any exposition of ideas. *Stanley* declined to draw a line between the transmission of ideas and mere entertainment. Insofar as this Court held that an adult's reading and viewing of obscene materials was protected by the First Amendment, even if the material was "devoid of any ideological content", the doctrinal underpinning of *Roth* was cast in doubt. *Roth,* however, was not "scuttled"; *Roth* and its progeny remained supportive of state power to prohibit the dissemination of obscene materials, properly defined, to minors or to unwilling recipients.

The District Court, therefore, was correct, it is submitted, in holding, in the light of the First Amendment and this Court's decisions, that the prohibition of explicit sexual materials, voluntarily sought by adults, was incompatible with a system of freedom of expression. If the police officers, lawfully on the premises in *Stanley,* had observed in plain sight "gambling paraphernalia or other contraband", it is plain that Stanley could not have objected to a seizure of such materials upon the ground that his "privacy" had been invaded. The seizure of the "obscene" film in *Stanley* was condemned, therefore, by a majority of this Court, not because it invaded Stanley's "right of privacy", but because it invaded Stanley's First Amendment right to

receive information and ideas for his own intellectual and emotional satisfaction. It was only in the context of the *Stanley* case that the First Amendment right took on an "added dimension", to wit: the right to be free from intrusion into one's privacy.

(b) The concurring opinion of Justice Harlan states that *Stanley* recognized "that private possession of obscene materials is constitutionally privileged under the First Amendment". (Slip Opinion, 1). The concurring opinion, however, asserts that this did not necessarily mean that *Stanley* recognized that obscenity was constitutionally protected for its content. Such conclusion obscures the real issue in the case, it is submitted.

If Mr. Stanley or any other adult has a right under the First Amendment to possess obscene materials, the question presented is whether a State has the power to limit that First Amendment right by punishing those who would furnish Mr. Stanley or any other adult with the alleged obscene material they desire to read or view in the privacy of their homes. If the right of possession is a First Amendment right, then under the decided cases of this Court the State must present compelling state interests which would justify limitations upon that First Amendment right. Clearly, in the case herein, in the light of *Stanley*, the government could not argue that distribution to Mr. Stanley or any other willing adult was being prohibited because obscene material is devoid of ideological content or because it may cause antisocial conduct. *Stanley* declined to recognize such justifications for limitations upon First Amendment rights. If Mr. Stanley had a *First Amendment right* to possess obscene materials, he had the cognate right to acquire such materials without curtail-

ment through punishment of the individual who mailed him the material at Stanley's own request.

Moreover, if *Stanley* stands for no more than "a right to a protective zone ensuring the freedom of a man's inner life, be it rich or sordid" (Slip Opinion, 3), how can it be held that a State has the power to decimate that constitutional right by punishing the distribution of the "memorabilia of a man's thoughts and dreams" to Mr. Stanley at his request? How can it be stated that there is no "serious risk of infringing on the privacy of a man's thoughts" (Slip Opinion, 3) if the distribution of the material which serves to satisfy his heart and mind is destroyed by the State? The right of privacy recognizes individual autonomy, the right to develop one's beliefs and opinions by a process of self-evaluation. The concurring opinion of Justice Harlan honors the concept of "privacy" in the abstract, but denies its meaningful exercise in the concrete.

(c) It is true, as Justice Marshall observes in his concurring opinion, that the case came to the Court without the benefit of a full trial and on a sparse record. On the other hand, the issue presented in this case was whether or not the federal government, in the light of the decision in *Stanley*, could forbid the mailing of explicit sexual materials to requesting adults solely because of the danger that such material might fall into the hands of children. Appellee never denied Congressional power to forbid the dissemination of obscene material to minors. The point urged by appellee was that as long ago as this Court's decision in *Butler v. Michigan* it was held by a unanimous Court that the State could not quarantine the general reading public in order to shield juvenile innocence; that the state

legislation was not "reasonably restricted to the evil with which it is said to deal". (352 U.S. at 383). This Court stated in *Shelton v. Tucker,* 364 U.S. 479, 488: "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." This Court has emphasized: "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (*NAACP v. Button,* 371 U.S. 415, 438).

2. The "postscript", written by Justice White for a majority of the Court, avers that if the distribution and private consumption by adults of explicit sexual materials is to be free from governmental prohibition, with the State limited to preventing the dissemination of such material to children or to unwilling recipients, then the task is for the legislature and not for this Court.

It appears inconsistent for this Court to decline to construe 18 U.S.C. §1461 in accordance with the requirements of the Constitution, while not hesitating to construe 19 U.S.C. §1305(a) in such a manner as to allegedly "obviate the constitutional objections raised by appellee". (*United States v. Thirty-Seven (37) Photographs,* Slip Opinion, 9). In the latter case, the Court engaged in an act of judicial legislation by inserting provisions in the law which the legislature had never considered. On the other hand, in the case herein, the Court was not asked to rewrite legislation. The sole request was that the statute be construed and applied to prohibit the mailing of explicit sexual materials to only those segments of the population which the government had a right to protect.

The United States Supreme Court is specifically charged under the Constitution with the duty of ascertaining and declaring what is the "supreme law of the land". Every judicial officer is solemnly committed by oath "to support this Constitution". It is the Supreme Court of the United States upon whom the people of the nation depend for the protection of the indispensable freedoms guaranteed by the Constitution. The basic freedoms guaranteed by the Constitution do not exist solely for "calm" times or when "pressures, passions, and fears subside". (Dissenting Opinion of Justice Black, Slip Opinion, 10). Indeed, the Constitution is hardly needed in such times. The responsibility of this Court, it is submitted, is to help maintain those liberties essential to a self-governing society.

Conclusion.

For all the foregoing reasons, the petition for rehearing should be granted and the judgment of the District Court affirmed.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Appellee.

SAM ROSENWEIN,
Of Counsel.

Attorney's Certificate of Good Faith.

The undersigned Stanley Fleishman, attorney for appellee, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment the grounds of said petition are well taken and in conformance with the Court's Rules and that said petition for rehearing is not interposed for delay.

STANLEY FLEISHMAN,
Attorney for Appellee.